At-the-Market Offerings: Legal Considerations for Issuers and Investors
Evaluating and Using ATMs to Raise Public Equity

A Live 60-Minute Teleconference/Webinar with Interactive Q&A

Today’s panel features:
Dean M. Colucci, Partner, DLA Piper, New York
Joshua Feldman, Director, Cantor Fitzgerald, New York
James T. Seery, Partner, DLA Piper, New York

Wednesday, May 12, 2010

The conference begins at:
  1 pm Eastern
  12 pm Central
  11 am Mountain
  10 am Pacific

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WELCOME TO OUR WEBINAR

At-the-Market Offerings: Legal Considerations for Issuers and Investors

Wednesday, May 12, 2010
1:00 p.m. EDT

Presented by:
Introduction

- Introduction of Panelists
  - Joshua Feldman
    Director
    Cantor Fitzgerald
  - Dean Colucci
    Partner
    DLA Piper
  - James Seery
    Partner
    DLA Piper

- Overview of At-the-Market Offerings
- ATM Execution Mechanics
- Legal Mechanics of Structuring a Deal
- Questions and Answers
What Is An ATM Offering?

- ATMs enable public companies listed on a U.S. Exchange (NYSE, AMEX, NASDAQ) to sell to the public periodically during the term of the offering, through a broker-dealer, registered common or preferred shares in amounts and at times of the issuer’s choosing.

- The shares are sold at the then prevailing “market price” to “natural interest” in the market – thus the name “At-the-Market” offering.

- Employed by public companies eligible to issue securities using either Form S-3 under Rule 415 of the Securities Act of 1933 (“Securities Act”) or Form F-3 (as employed by Foreign Private Issuers).
At-the-Market Offerings (ATMs)

- ATM programs with a value in excess of $40 billion have been implemented since 2001 with programs put in place in 2009 exceeding $22 billion in value (value calculated at time of filing).
- Issuers from a wide variety of industries including:
  - Airlines
  - Banking and financial services
  - Biotech and life sciences
  - Energy and utilities
  - Natural resources
  - Real estate and real estate investment trusts
  - Technology
  - Transportation
  - Closed End Funds
Distinctions Between ATM and Other Shelf Takedown Products

- Equity lines of credit, registered directs, and PIPEs are more dilutive, typically require warrant coverage, and incur much higher all-in transaction costs than ATMs.

- There is generally no lock-up period during the term of the agreement and the issuer is free to pursue a traditional follow-on if business or market conditions merit.

- Equity issuances are disclosed at the end of each quarter in the issuer’s periodic reports under the Securities Exchange Act of 1934.

- For NASDAQ Issuers, ATM programs (unlike PIPES, equity lines and certain registered direct offerings) are considered “Public Offerings” under NASDAQ Rule 5635 – shareholder approval is NOT required under US laws if the issuer desires to issue more than 20% of its common stock or voting securities through an ATM offering.
## Overview of the Controlled Equity Offering℠

- Cantor’s ATM product, the Controlled Equity Offering℠ (CEO℠) Program, is a flexible equity offering vehicle that gives its clients the ability to sell shares from time-to-time by discreetly feeding demand in market neutral transactions.
- Cost efficient, low-profile financing option for companies to raise capital over time.
- Enables issuers to raise equity when needed and to match the sources and uses of funds.
- Minimizes underwriting costs – transaction costs range from 2 to 5% depending on market cap of issuer and size of transaction, but if underwriter exceeds the volume weighted average price (VWAP) of the security being issued over the execution period authorized by client, the all-in-cost of issuance is significantly reduced and dilution minimized.
- Leverages Cantor’s position and trading expertise as the dominant third market trading firm.
Cantor Fitzgerald and ATMs

- Cantor Fitzgerald created one of the first ATM programs available to public companies and Cantor remains the leader in ATM offerings
- Cantor has executed far more ATM offerings than any other broker-dealer since 2001 (including 29 programs since the beginning of 2009 and 9 programs YTD)
- Senior-level “dedicated” execution team has been active in ATM transactions since 2001 – skilled in accessing all liquidity pools and executing both anonymously and efficiently
Benefits of ATM Offerings

- Event Driven
- Continuous Capital Need
- Balance Sheet Strength
- Increased Liquidity
- Cost of Capital
- Flexibility & Control
- Anonymity
Benefits of ATMs

- **Flexibility & Control**: Ability to execute on natural demand when there is a need, number of shares and minimum price. Can change instruction as often as desired.
  - Sales are **only** made per the company’s **specific** instructions
  - Client parameters include **size**, **price**, and **type** of execution
  - Sales can be initiated, halted, or changed **at any time**

- **Efficiency**: Able to match uses and sources better than traditional offerings

- **Lower Cost of Capital**: No market discount, no warrant coverage, lower underwriter compensation

- **Ability to Monitor Progress**: Sales price versus VWAP over time period in which broker-dealer is authorized to execute

- **Anonymity**: Sales may be made completely anonymously and execution anonymity ensures that the market will not be aware when or if sales are made through the ATM structure
Cantor’s Approach to ATM Execution

- At Cantor Fitzgerald, orders are executed by dedicated ATM capital market traders who are entirely focused on issuers.

- Information flows **only** one way from Cantor’s 15 trading floors to the ATM capital markets traders. Even internally at Cantor, the ATM capital market trader’s execution remains anonymous.

- While a majority of all sales are made anonymously at-the-market, the ATM structure provides the flexibility to execute negotiated block transactions.
Lower “All-in-Cost”

ATMs and Cantor’s CEO<sup>SM</sup> product allows companies to raise money without sacrificing price-stability, and at less of a cost than follow-on offerings, registered directs or PIPEs.

- For PIPEs/registered directs announced YTD, the all-in cost of capital is near 20% when taking into account the underwriter fee, market discount and warrant coverage.
- Non-ATM deals traditionally observe a negative impact on their stock price going into the transaction as well as post-announcement.
- ATM underwriting fees are typically 2-5%. ATM deals traditionally do not experience any significant price impact. Historically Cantor has beaten the VWAP when placing shares resulting in less dilution.

Source: Capital IQ

Note: Financings include deals with transactions over $10m and under $150m. Market discount based on the closing price one day prior to announcement.
ATMs: Step by Step

1. File a shelf registration statement on Form S-3 or F-3
2. Conduct due diligence
3. Negotiate a Sales Agreement or Equity Distribution Agreement (name varies from underwriter to underwriter) and prepare the prospectus supplement
   - There is no “firm commitment” by the investment bank to purchase or sell any fixed number of securities, and either the Issuer or the investment bank can terminate the agreement at any time, regardless of whether the program has been completed
4. File prospectus supplement and Sales Agreement (as an 8-K or as an exhibit to a 10-Q or 10-K). Provide comfort letter and necessary opinions to underwriter.
5. Issuer places sell orders directly with underwriter when funds are needed or market opportunities arise. Issuer may provide specific instructions for the sales (price, size, timing, etc.) and can alter the instructions at any time.
   - Each day’s sales will be settled on the usual T+3 business days cycle
   - Continue due diligence and bring down the comfort letters and legal opinions on a quarterly basis
   - An ATM program may be temporarily halted to allow time for an issuer to update its public disclosures with regard to a material corporate transactions
6. At quarter end, issuer discloses cumulative sales in their 10-Q/K
Who Is Eligible for ATMs?

- Companies listed on a US Exchange (NASDAQ, AMEX, NYSE) that are eligible to file either Form F-3 or Form S-3 Shelf Registration Statements under Rule 415 of the Securities Act

- Canadian issuers listed on the TSX and a US exchange are eligible to use Form F-10 under the Multi-Jurisdictional Disclosure System (MJDS)

- Form F-3/S-3 eligibility requirements for issuers with a public float of greater than $75 million:
  - Securities registered under Section 12 of Securities Exchange Act of 1934 (“Exchange Act”) are required to file reports under Section 15(d) of Exchange Act
  - Timely file all Exchange Act reports during the 12 months preceding the later of the filing of the F-3/S-3 or the 10-K/20-F
Who Is Eligible for ATMs?

- Form F-3/S-3 eligibility requirements for issuers with a public float of less than $75 million:
  - The same requirement for issuers with a public float of greater than $75 million and
    1. The issuer must have a class of common equity securities listed and registered on a US national securities exchange
    2. The issuer must not have been a shell company for a minimum of 12 months prior to the filing of the F-3/S-3

- Issuers with a public float of less than $75 million may not sell more than 1/3 of its public float under an F-3/S-3 over a period of 12 months including the ATM and any other shelf takedowns
Legal Documentation for ATMs

- Effective form F-3/S-3
- Prospectus supplement – filed pursuant to Rule 424(b)(2) or 424(b)(5) of the Securities Act
- Sales agreement or equity distribution agreement – similar in form and substance to typical underwriting agreement
  - Filed with SEC on Form 6-K or Form 8-K at execution
  - Stays in place for as long as there is unsold stock
- The issuer has ongoing obligations throughout the term of the agreement including:
  - Quarterly negative assurance letters from the issuer’s counsel
  - Quarterly comfort letters from the issuer’s auditors

At-the-Market Offerings: Legal Considerations for Issuers and Investors
Other Legal Considerations

- Regulation M Issues
  - Research
  - Market-Making
- NASDAQ Public Offering Rule (Rule 5635)
- FINRA
- Integration Issues
- Closed End Fund Requirements
ATMs Going Global

- Canada
  - MJDS Issuers
- Israel
- Europe
- Beyond?
What Research Analysts Are Saying About ATMs...

[ATMs] allow companies to raise very low cost capital, while also having control over the timing and size of the offering, as well as selectively expand their institutional ownership. We believe this is a very intelligent source of capital with minimum disruption.

Major National Bank

From an issuer’s perspective, [ATMs] have several advantages in our view. First, management of the issuer does not need to conduct time consuming road shows. Second, the issuer does not face the risk of seeing its stock price drop in the market between the time of announcement and pricing. Thus, the cost of issuing equity in this manner is meaningfully more affordable than the traditional bulk sale method.

Money Center Bank

The company entered into [an ATM] agreement to sell up to two million shares of beneficial interest...We believe that this is an efficient way to raise capital and fits the company’s matching funds strategy. We do not expect the company to utilize this capital until later in the year.

Regional Investment Bank

We remind investors that the controlled equity offering (CEO) program allows companies to issue equity in small, periodic increments. CEOs are usually done to manage capital needs and raise capital in an optimal fashion, with periodic increments that may not cause as much pressure on a stock as a single large equity offering might. Further, CEOs have lower underwriting fees. The prospectus indicates that [The Company] will be paying a 2% gross fee - materially lower than the 4.5% underwriter’s fee paid by [other companies] in recent secondary offerings.

International Investment Bank
## Select ATM Transactions

In total, CF&Co. has put more than 90 CEO programs in place. These programs, most generically known as “at-the-market” offerings, have exceeded over $10bn in value.

<table>
<thead>
<tr>
<th>Month</th>
<th>At-the-Market Offering</th>
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<tbody>
<tr>
<td>April 2010</td>
<td>$20,000,000</td>
</tr>
<tr>
<td>October 2009</td>
<td>$24,000,000</td>
</tr>
<tr>
<td>November 2009</td>
<td>$25,000,000</td>
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<tr>
<td>December 2009</td>
<td>$23,000,000</td>
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<tr>
<td>March 2010</td>
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<td>May 2010</td>
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<td>June 2010</td>
<td>$20,000,000</td>
</tr>
<tr>
<td>July 2010</td>
<td>$21,000,000</td>
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- Deep industry coverage
- Capital structure and M&A advisory
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- Leveraged finance & financial sponsors
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- Real Estate Capital Markets and Advisory Services

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- 225+ fixed income salespeople, traders and research analysts
- Broad credit trading platform – HY, loans, IG, Eurobonds
- Trade over $200 bn in credit securities daily
- Strong leveraged finance team in NY & London
- Mortgage securities, agencies, municipals, repos

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- 5,000+ institutional accounts
- Global distribution with offices around the globe
- Aggressive, commission-based sales force
- Growing equity research platform

REAL ESTATE CAPITAL MARKETS

- Mergers and Acquisitions Expertise
- Seasoned team with 20+ years of experience
- Leaders in loan originations, Private Equity Capital raising and Advisory services
- Expansive sector footprint

MERCHANT BANKING

- Partner with best of class management teams
- Focus on growth sectors that leverage off of strong management team
- Investments of $50 million to $1 billion

CANTOR FITZGERALD’S GLOBAL FOOTPRINT

- Over 3,800 employees in 39 cities including 20 major financial hubs worldwide
- One of the largest sales forces in the industry: 280+ institutional sales and trading professionals provide global access to investors
About DLA Piper

THE FIRM

- More than 3,500 lawyers in 67 offices and 29 countries
  - The US practice includes approximately 1,300 lawyers
  - In Europe and Asia, the firm has approximately 2,200 lawyers
- The largest law firm in the world by number of lawyers and the only firm in the world with more than 1,000 lawyers on each side of the Atlantic

OUR CLIENTS

- We represent half of the FTSE 250 or their subsidiaries and more than 140 of the top 250 companies in the Fortune 500